

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the of the Temporary  
Immediate Suspension of the Family  
Child Care License of Carol McComas

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATION**

This matter came on for Hearing before Administrative Law Judge Steve M. Mihalchick on February 11, 2004, at the Office of Administrative Hearings, Minneapolis, Minnesota. The hearing record closed at the conclusion of the hearing on February 11, 2004.

Vicki Vial Taylor, Assistant Hennepin County Attorney, 525 Portland Avenue S., 12<sup>th</sup> Floor, Minneapolis, Minnesota 55415, appeared for the Minnesota Department of Human Services (the Department) and Hennepin County Children, Family and Adult Services Department (the County). Michael Milo, Michael Milo & Associates, P.A., 7400 Metro Boulevard, Suite 250, Edina, Minnesota 55439, appeared on behalf of the Licensee, Carol McComas.

**NOTICE**

This Report is a recommendation, **not** a final decision. The Commissioner of Human Services will make a final decision after reviewing the administrative record, and may adopt, reject or modify these Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by the Report to file exceptions and present argument to the Commissioner. Parties should contact Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155 to ascertain the procedure for filing exceptions or presenting argument. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2. The record closes upon the filing of comments, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

**STATEMENT OF ISSUE**

Pursuant to Minn. Stat. § 245A.07, subd. 2a, the sole issues are whether the temporary immediate suspension should remain in effect and whether the Department has demonstrated that reasonable cause exists to believe an imminent risk of harm to the health, safety, or rights of day care children exists.

The Administrative Law Judge concludes such reasonable cause does exist and that the temporary immediate suspension should remain in effect.

Based upon the proceedings herein, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. Licensee has been licensed to provide family childcare in her home since 1987. Licensee's daycare is located in Crystal, Minnesota. Licensee has fifteen children in her daycare. Four of these children are Licensee's grandchildren.

2. On December 10, 2003, the County's Child Protective Services division (CPS) received a report that a person had been present at Licensee's daycare in late October or early November, 2003. The report indicated that this person, recognized as "Jason," was listed on the Department of Corrections website for sex offenders.<sup>[1]</sup> That person was Jason Sand, a Level 3 sex offender.<sup>[2]</sup>

3. Based on the report, CPS initiated an investigation. The CPS intake worker contacted Will McDonald, Sand's probation officer. McDonald confirmed to CPS that Sand was a Level 3 sex offender and that Sand's probation prohibited direct or indirect contact with minor children.<sup>[3]</sup> Kurt Hannes, an investigator with CPS, initiated an investigation based on the information received.

4. On December 16, 2003, Hannes began interviews with parents of Licensee's daycare. Hannes interviewed a three-year-old daycare child, A.H. A.H. identified several adults who had been at Licensee's daycare and he spontaneously included "Jason" as an adult who had been there. A.H. stated that he had seen Jason at the daycare once, and only in the kitchen.<sup>[4]</sup>

5. Immediately after concluding the interview with A.H., Hannes went to the Licensee's daycare. Licensee acknowledged that Sand has been in the daycare while children were there, but indicated that such visits were infrequent. She indicated that she managed Sand's money, and he stops by "from time to time," more often in the evenings after daycare hours.<sup>[5]</sup> Licensee told Hannes that Sand had two sex offense convictions, but that she did not believe he had actually committed the crimes that he had been convicted of. Licensee indicated that Sand had been "set-up."<sup>[6]</sup>

6. Hannes asked Licensee if she was aware that Sand was prohibited from having direct contact with children. Licensee said that the only restriction she knew of was that Sand could not live in the daycare home.<sup>[7]</sup> Licensee told Hannes that she knew Sand was classified as a Level 3 sex offender.

7. Later on December 16, 2003, Hannes interviewed the mother of two other daycare children, D.V. and V.V. D.V.'s mother indicated that she had seen Sand at Licensee's daycare. Sand was on the daycare premises with his girlfriend and Licensee's daughter when Licensee was hospitalized after surgery.<sup>[8]</sup> D.V.'s mother agreed to allow Hannes to interview D.V. at school the next day.

8. On December 16, 2003, Hannes interviewed Licensee's daughter, Bonita Kuhlman by telephone. Ms. Kuhlman has two children in Licensee's daycare. Ms.

Kuhlman is Sand's aunt. She initially expressed no concern about Sand's status, indicating that she believed the "charges" to be "bogus." Ms. Kuhlman noted that she had not been alarmed when Sand had been around her children. Hannes informed her that Sand had two convictions and was prohibited from contact with children. Ms. Kuhlman expressed frustration that she had not been given that information by other family members.<sup>[9]</sup>

9. Hannes telephoned Michele Norberg, mother of a child in Licensee's daycare, on December 16, 2003. Ms. Norberg knew Sand as Licensee's grandson. She did not know of Sand's criminal history. Ms. Norberg told Hannes that she observed Sand in Licensee's daycare on a number of occasions, including once when Sand was in the living room of the daycare premises at pick-up time.<sup>[10]</sup>

10. On December 17, 2003, Hannes interviewed D.V. at his elementary school. D.V. is ten years old and in the fourth grade. D.V. indicated that his mother had discussed Sand the previous night and D.V. now knew Sand was a Level 3 sex offender. D.V. described Sand's visits as lasting between thirty minutes and one hour, and occurring three or four times when D.V. was Licensee's daycare. D.V. indicated that he had never been alone with Sand and D.V. was not afraid of him.<sup>[11]</sup>

11. After concluding the interview with D.V., Hannes interviewed V.V. V.V., D.V.'s younger brother, is five years old. In response to general questions by Hannes, V.V. indicated identified Sand (by his first name, Jason) as being present at the daycare occasionally. In response to more specific questions about whether Sand babysat the daycare children, V.V. described one instance of Sand being there with two women who were babysitting. V.V. told Hannes that none of the daycare children had been hurt by Sand. V.V. confirmed that the photo of Sand from the Department of Corrections website was the person they had been discussing.<sup>[12]</sup>

12. On December 17, 2003, Hannes telephoned Terry Stark of CPS and reviewed the information collected in the investigation. They concluded that a finding of maltreatment by Licensee was warranted due to her allowing access to all of her daycare children by a Level 3 sex offender.<sup>[13]</sup> On December 22, 2003, notification letters were mailed to Licensee and the parents of all the children in her daycare.

13. For child protection purposes, the determination is whether "maltreatment" has occurred and whether child protective services are needed. "Maltreatment" means "physical abuse", "neglect", "sexual abuse", "mental injury" or "maltreatment in a facility" such as a day care facility. A determination that child protective services are needed must be based upon conditions sufficient to cause a Child Protection Worker,

to conclude that a child is at significant risk of maltreatment if protective intervention is not provided and that the individuals responsible for the child's care have not taken or are not likely to take actions to protect the child from maltreatment or risk of maltreatment.<sup>[14]</sup>

14. The December 22, 2003 letter to the Licensee from CPS indicated that maltreatment occurred and that Licensee's daycare was the responsible party. The

letter described how to ask for reconsideration of the maltreatment finding.<sup>[15]</sup> Licensee did not request reconsideration.<sup>[16]</sup>

15. As part of the usual procedure when CPS investigates maltreatment allegations, the County assessed whether action needed to be taken regarding the daycare license of Licensee. Such action requires a decision from the Department of Human Services, usually made with a recommendation from the responsible county regarding the need for the action. Lisa Yates, Senior Social Worker for the County's Human Service Division received the referral after the maltreatment determination, but before the notice of that determination was sent to Licensee. On December 19, 2003, the County made the following recommendation to the Department:

The Provider maltreated (neglected) children in her care by allowing a known sex offender to be present in the facility during Child Care hours. Hennepin County cannot assure the safety of the children in Ms. McComas' care. Hennepin County determined that the health, safety, and/or rights of children in the McComas daycare are in imminent danger. Therefore, Hennepin County Child Care Licensing recommends that the child care license of Carol McComas be immediately suspended.<sup>[17]</sup>

16. The County submitted a summary of the investigation and several supporting documents along with the recommendation to the Department.<sup>[18]</sup> The County also set out the prior history of the Licensee's noncompliance. The history consisted of three substantiated complaints. One was a failure to properly supervise a child in 1991. Another was a sanitation and health complaint in 1992. The third was a documented instance of overcapacity in 1993.<sup>[19]</sup>

17. Later on December 19, 2003, the Department issued the Order of Temporary Immediate Suspension to Licensee and faxed it to the County to be served personally upon Licensee.<sup>[20]</sup>

18. The Order of Temporary Immediate Suspension cited the allegation of maltreatment that was under investigation as the basis for the immediate suspension. The specifics were not identified in the Order due to data practices restrictions. The Order further stated that due to the serious nature of the violation under investigation, the County could not ensure the safety of persons served by the program and, therefore, that the Department found that the health, safety, and rights of children in Licensee's care were in imminent danger.<sup>[21]</sup> The Order identified how to appeal the immediate suspension.

19. On December 22, 2003, Licensee faxed a letter requesting an appeal.<sup>[22]</sup> The Notice of and Order for Hearing in this matter was issued by the Department on December 22, 2003. The Notice of Hearing stated that immediate suspension was based upon the CPS determination that Licensee allowed a Level 3 sex offender "to have contact with daycare children on multiple occasions."<sup>[23]</sup>

## **CONCLUSIONS OF LAW**

1. The Administrative Law Judge and the Minnesota Department of Human Services have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. §§ 14.50 and 245A.07, subd. 2a.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. Under Minn. R. 9502.0341, subp. 9, "If the commissioner finds that the health, safety, or rights of the children in care are in imminent danger, the commissioner shall immediately suspend the license."

4. Hearings on immediate suspensions are governed by Minn. Stat. § 245A.07, subd. 2a, which sets the burden of proof as follows:

The burden of proof in expedited hearings under this subdivision shall be limited to the commissioner's demonstration that reasonable cause exists to believe that the license holder's actions or failure to comply with applicable law or rule poses an imminent risk of harm to the health, safety, or rights of persons served by the program.

5. Reasonable cause exists to believe that Licensee's practice of allowing Jason Sand to have contact with her daycare children poses an immediate risk of harm to the health, safety, and rights of the children in her daycare. Allowing any Level 3 sex offender to have direct contact with daycare children constitutes an imminent danger to the health, safety, or rights of daycare children. At a minimum, Licensee was aware that Sand was a Level 3 sex offender. Nevertheless, she allowed Sand to have such contact.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

## **RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the Order of Temporary Immediate Suspension be **AFFIRMED**.

Dated: February 17, 2004.

s/Steve M. Mihalchick  
STEVE M. MIHALCHICK  
Administrative Law Judge

## **NOTICE**

Pursuant to Minn. Stat. § 14.62, subd. 1, the Minnesota Department of Human Services is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape recorded (2 tapes). No transcript prepared.

## **MEMORANDUM**

In the course of this proceeding, the County introduced evidence regarding substantiated complaints against the Licensee and observations of Licensee's interactions with daycare children. The complaints date from a decade ago. The Department did not rely upon the complaints nor the recent observations in issuing the Order of Immediate Suspension. Other information about the Licensee's daycare must be considered prior to issuing a suspension.<sup>[24]</sup> None of the complaints or recent observations demonstrate the risk of harm required to support an immediate suspension.

Licensee maintains that she did not know that allowing a Level 3 sex offender to have access to day care children would pose a risk of harm. Licensee was unaware of the terms of Sand's probation prohibiting contact with children. Licensee has also expressed her opinion that Sand did not actually commit the offenses that he has been convicted of.

Licensee was aware that Sand had been convicted of two sex offenses. Licensee was also aware that Sand was classified as a Level 3 sex offender. Licensee allowed Sand to have direct contact with daycare children on several occasions.

At the hearing, Licensee questioned whether the type of sex offenses committed by Sand demonstrated that he posed a risk of harm to children. But he was convicted of crimes where his victims were 13 and 16 years old. Apparently there are other allegations, because the age range of his victims described by the Department of Corrections is from three to seventeen years of age.<sup>[25]</sup> His victim pool includes children that are the age of daycare children. All daycare licensees are obliged to prevent direct contact with daycare children by persons who are disqualified from such contact.<sup>[26]</sup> Persons registered as sex offenders are disqualified from contact with daycare children.

Licensee asserted that immediate suspension is not warranted, since Licensee would now not allow contact between a sex offender and daycare children. That Licensee allowed Sand to have access to the daycare children in the past demonstrates a serious lack of perception of risk that is needed to assure the health, safety, and rights of those children. Temporary immediate suspension of Licensee's daycare license is appropriate.

S.M.M.

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<sup>[1]</sup> Ex. 1.

<sup>[2]</sup> The Minnesota Department of Corrections has established a risk assessment scale for sex offenders pursuant to Minn. Stat. § 244.52. Level 3 is assigned to sex offenders determined to be most at risk to re-offend who do not meet the standard for civil commitment.

<sup>[3]</sup> Testimony of Kurt Hannes; Ex. 1.

<sup>[4]</sup> Testimony of Kurt Hannes, Ex. 6, at 9-10.

<sup>[5]</sup> Testimony of Kurt Hannes, Ex. 6, at 8-9.

<sup>[6]</sup> Testimony of Kurt Hannes.

<sup>[7]</sup> Testimony of Kurt Hannes.

<sup>[8]</sup> Testimony of Kurt Hannes; Ex. 6, at 7.

<sup>[9]</sup> Ex. 6, at 6.

<sup>[10]</sup> Ex. 6, at 6.

<sup>[11]</sup> Ex. 6, at 4.

<sup>[12]</sup> Ex. 6, at 4.

<sup>[13]</sup> Ex. 6, at 2.

<sup>[14]</sup> Minn. Stat. § 626.556, subd. 10e.

<sup>[15]</sup> Ex. 5.

<sup>[16]</sup> Ex. 24.

<sup>[17]</sup> Ex. 2, at 5.

<sup>[18]</sup> Ex. 2.

<sup>[19]</sup> Ex. 2, at 2.

<sup>[20]</sup> Ex. 3.

<sup>[21]</sup> Ex. 3.

<sup>[22]</sup> Ex. 4.

<sup>[23]</sup> Notice of and Order for Hearing, Exhibit A, at 1.

<sup>[24]</sup> Minn. Stat. § 245A.04, subd. 6.

<sup>[25]</sup> Ex. 7.

<sup>[26]</sup> Minn. Stat. § 245C.04.